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IN THE

Supreme Court of the United States

October Term, 1967
No. 378

P. S. O'REILLY, M.D.,
Petitioner and Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Defendant and Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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Petition for Writ of Certiorari to the Supreme Court of the State of California.

P. S. O'Reilly, M.D. respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California entered in the above matter on April 19, 1967.

CITATION TO OPINION BELOW.

The opinion of the California Supreme Court is printed as Appendix A hereto and is reported at 66 Advance California Reports 391.

JURISDICTION.

The opinion and judgment of the California Supreme Court was entered on April 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED.

The question presented involves the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

Dr. O'Reilly has been licensed as a medical doctor in the State of California, where he operates the California Emergency Hospital. Pursuant to the United States Information and Educational Exchange Act of 1948, the United States Department of State approved the California Emergency Hospital as a sponsor institution to conduct an Exchange Visitor Program under the Act and designated Dr. O'Reilly as the responsible officer. The Department of State qualified two foreign physicians, Daniel Sanchez, a Mexican national, and M. Ohnishi, a Japanese national, as exchange visitors under the Federal Program for the specific purpose of receiving training at the California Emergency Hospital under Dr. O'Reilly's supervision in "traumatic and reconstructive surgery, with special emphasis on reconstruction of the hand and forearm." Dr. Ohnishi was admitted for 18 months; Dr. Sanchez for up to five years.

As a part of such training, Drs. Ohnishi and Sanchez assisted Dr. O'Reilly in performing surgery, which constitutes the performance of a medical act under California law. Neither Dr. Sanchez nor Dr. Ohnishi was licensed to practice medicine in California, nor was either of them approved by the California Board of Medical Examiners as a foreign graduate student. The California Emergency Hospital was not approved by the California Board of Medical Examiners as a medical training institution. Dr. O'Reilly was accused and found guilty of unprofessional conduct in employing

and aiding and abetting unlicensed persons in the practice of medicine, in violation of California law.

The question presented is as follows: Where persons have been authorized by the Department of State to give and receive a course of instruction under an Exchange Visitor Program pursuant to the United States Information and Educational Exchange Act of 1948, may a State prohibit the parties from performing said Program unless they first obtain the discretionary approval of a State licensing board, and may a State punish such persons if they perform the Federal Program without first obtaining the approval of a State licensing board. Stated differently, is the authorization by the Department of State to conduct an Exchange Visitor Program to be subordinated to the discretionary approval of various State licensing boards?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

The constitutional provision involved is the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2).

The Federal Statute involved is the United States Information and Educational Exchange Act of 1948 (22 U.S.C. Section 1431-1480).

The Federal regulations involved are 22 Code of Federal Regulations, Chapter I, Part 63. They are printed as Appendix B hereto.

The State statutes involved are California Business and Professions Code Sections 2147, 2147.5, 2147.6, 2193 and 2392. They are printed as Appendix C hereto.

HOW THE FEDERAL QUESTION IS PRESENTED.

The Board of Osteopathic Examiners of the State of California issued an accusation against Dr. O'Reilly charging him with employing and aiding and abetting Drs. Sanchez and Ohnishi, unlicensed persons, in the practice of medicine in connection with the treatment of a specific patient on or about August 21, 1959.[1,2] At the administrative hearing, Dr. O'Reilly raised the Federal question and urged compliance with the Federal statute and regulations as a defense to the accusation [A. T., Vol. I, pp. 5, 9-21]. The Board of Medical Examiners, to whom the case was transferred, found him guilty of the accusation [C. T. pp. 18-21]. Petitioner filed a Petition for Writ of Mandate in the Los Angeles Superior Court under Code of Civil Procedure of California, Section 1094.5 [C. T. pp. 1-12]. The Superior Court affirmed the administrative decision and denied his Petition [C. T. pp. 62-63]. Petitioner appealed to the Court of Appeal of the State of California, which ruled adversely to him on the Federal question. He thereafter petitioned for and was granted a hearing in the California Supreme Court. The California Supreme Court thereafter rendered a

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[1]There was a second and unrelated charge which involved no Federal question and is not presented for consideration herein.

[2]A Reporter's Transcript of the administrative proceeding, together with exhibits introduced therein were introduced into evidence as exhibits in the Trial Court and were lodged with the California Court of Appeal and California Supreme Court as part of the record on appeal, together with the Clerk's Transcript and Reporter's Transcript of proceedings in the Trial Court. Exhibit references herein are to the exhibits introduced in the administrative hearing. Transcript references to the administrative hearing are designated "A. T.". References to the Clerk's Transcript are designated "C. T." and references to the Reporter's Transcript in the Trial Court are designated "R. T.". The entire record, including the above mentioned transcripts and exhibits, is filed in support of this Petition.

decision in which it determined the Federal question presented herein adversely to petitioner. As discussed more fully below, the California Supreme Court acknowledged that enforcement of the State medical liensing laws could impair and wholly defeat the Exchange Visitor Programs under which Drs. Ohnishi and Sanchez were admitted to the United States, but concluded that it was the intent of Congress to subordinate the Federal programs to the medical licensing laws of the various states. Dr. O'Reilly's Petition for Rehearing was denied.

The Federal question has been asserted by petitioner at all stages of this litigation.

STATEMENT OF CASE.

A. The United States Information and Educational Exchange Act of 1948.

1. The Statute.

The purpose of the U. S. Information Educational Exchange Act of 1948 is set forth in the Act as follows (22 U.S.C. Section 1431):

> "The Congress declares that the objectives of this chapter are to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of other countries. Among the means to be used in achieving these objectives are: . . .
>
> "(2) an educational exchange service to cooperate with other nations in
>
> "(a) the interchange of persons, knowledge and skill;

(b) the rendering of technical and other services;

(c) the interchange of developments in the field of education, the arts and sciences."

Implementation and enforcement of the program was delegated to the Secretary of State under 22 U.S.C. Section 1446 which provided in part as follows:

". . . The Secretary is authorized to provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill and shall wherever possible provide these interchanges by using the services of existing reputable agencies which are successfully engaged in such activity. . . . When any country fails or refuses to cooperate in such program on a basis of reciprocity the Secretary shall terminate or limit such program, with respect to such country, to the extent *he deems to be advisable in the interests of the United States.* The persons specified in this section shall be admitted as non immigrant visitors for business under clause 2 of section 203 of Title 8, for such time and *under such conditions as may be prescribed by regulations promulgated by the Secretary of State* and the Attorney General . . ." (Emphasis added).

2. Federal Regulations.

The Federal regulations implementing the Exchange Visitor Programs appear as Appendix B hereto. Briefly summarized, the regulations required prospective exchange visitors and sponsor institutions to submit ap-

plications to the Secretary of State, accompanied by such supporting information as the Secretary should require in order to determine the eligibility of the applicants and the programs for exchange visitor status (22 C.F.R. § 63.2-63.5).

Section 63.3(a) provides in part

> ". . . the Secretary *may* require a sponsor to present any evidence of a documentary nature, e.g., program reports, institutional catalogs, letters of professional recognition, accreditation, or approval, *which he may consider necessary* in making his determination of the eligibility of the program to be designated as an Exchange Visitor Program." (Emphasis added).

Section 63.3(b) provides in part

> ". . . the Secretary *may in his discretion* designate the sponsor's program as an Exchange Visitor Program."

and

> "the Secretary *may in his discretion* revoke designation of an Exchange Visitor Program for any sufficient cause, including but not restricted to: (1) failure to maintain educational standards as established by competent professional agencies; (2) failure to submit reports on program operation when requested by the Secretary; (3) misuse of the Exchange Visitor Program." (Emphasis added).

B. Petitioner's Authorization Under the Exchange Visitor Program.

On June 20, 1957, the Department of State notified Dr. O'Reilly that the Glendale Emergency Hospital program was approved under the Exchange Visitor Program and that Dr. O'Reilly was designated as the responsible officer [see Ex. B-6]. On January 16, 1959, the Department of State acknowledged the change of name of Glendale Emergency Hospital to California Emergency Hospital [Ex. B-7].

C. Dr. Ohnishi's and Dr. Sanchez's Authorization Under the Exchange Visitor Program.

Prior to his admission to the United States under the Exchange Visitor Program, Dr. Ohnishi was a licensed medical doctor in Japan and was an instructor of surgery at Nakayama Surgical Department, School of Medicine, Chiba University. He was admitted to the United States under the Exchange Visitor Program for a period of 18 months for the express purpose of receiving training under Dr. O'Reilly's supervision, "in traumatic and reconstructive surgery, with special emphasis on reconsideration of the hand and forearm." [Exs. B-13, B-15, B-16 and B-18]. Dr. Sanchez was a licensed medical doctor in Mexico, and he was admitted to the United States under the Exchange Visitor Program for a period of five years for the purpose of receiving the identical training under the supervision of Dr. O'Reilly [Ex. B-19]

D. Compliance With the Exchange Visitor Program.

It was stipulated that the California Emergency Hospital and Dr. O'Reilly fully complied with all applicable regulations in accepting Drs. Ohnishi and Sanchez as trainees under the Exchange Visitor Program [A. T. Vol. I, p. 5, lines 18-20; Exs. B-15 to B-19]. It was further stipulated or was otherwise uncontroverted that their training was carried out under the immediate and personal instruction of Dr. O'Reilly; that Dr. O'Reilly was present at all times, and that Drs. Sanchez and Ohnishi were in fact assisting him in connection with the incident which forms the basis for the accusation of unprofessional conduct [A. T. Vol. I, pp. 20-21].

E. Pertinent California Law.

The California Emergency Hospital was not qualified by the California Board of Medical Examiners as an approved medical school or teaching hospital. Neither Dr. Ohnishi nor Dr. Sanchez was approved by the Board as qualified medical student, intern, resident or licensed doctor. They did not qualify under any of the following provisions of the California Business and Professions Code:

1. Section 2147, which provides an exemption from medical licensure to students "regularly matriculated in any legally chartered school *approved by the Board* from treating, without compensation to the student, the sick or afflicted as a part of a course of his study." (Emphasis added).

2. Section 2147.5, which permits graduates from *Board approved schools* to treat the sick and afflicted

as a part of a course of study *in a school approved by the Board* or as an intern in a hospital *approved* for the training of interns. This sections also permits graduates of schools *approved by the Board* to act as resident or assistant resident physicians in hospitals or public health departments *approved* for residencies provided that such resident or assistant resident shall qualify for and take the next succeeding examination for physicians and surgeons certificate or otherwise qualify for such certificate.

3. Section 2147.6, which applies to foreign post-graduate students, provides that the Board of Medical Examiners *may* allow a foreign physician to undertake post-graduate study in *an approved medical school* upon *approval* of his application *by the Board* for a period not in excess of one year[3].

4. Section 2193, which delineates the requirements for medical licensure for non-citizen graduates of foreign medical schools. Such an applicant must furnish documentary evidence *satisfactory to the Board* that he has completed medical studies and professional instruction equivalent to that required under California law; that he has received a medical diploma; that he is admitted to practice medicine in the country wherein the institution in which he has completed his course of professional study is located; and that the country in which he has been licensed to practice medicine will admit United States citizens to practice therein on a reciprocal basis. Upon fulfilling the foregoing requirements, the applicant must serve a two-year internship in the United States and pass written and oral examinations encompassing a broad range of medical topics. Section 2193

[3]In 1965, this one year period was changed to five years.

specifically authorizes the Board of Medical Examiners to disapprove any foreign medical school or deny any application if, *in the Board's opinion,* the foreign instruction was not equivalent to that required under California law.

As noted above, the California Emergency Hospital was not approved by the Board of Medical Examiners as a training institution, and Drs. Ohnishi and Sanchez neither applied for nor received the approval of the Board of Medical Examiners as foreign post-graduate students or as licensed physicians and surgeons.

F. The Accusation and Proceedings Against Dr. O'Reilly.

On September 12, 1962, the Board of Osteopathic Examiners of the State of California commenced disciplinary proceedings against Dr. O'Reilly by issuing an accusation charging him with employing, aiding and abetting Drs. Sanchez and Ohnishi, unlicensed persons, in the practice of a system or mode of treatment of the sick or afflicted in connection with a surgical operation performed on August 21, 1959 [C. T. pp. 14-16]. Dr. O'Reilly was found guilty of the charge and was placed on probation for five years and suspended from practice for 90 days [C. T. pp. 18-21]. He filed a Petition for Alternative and Peremptory Writs of Mandate in the Superior Court of the County of Los Angeles pursuant to California Code of Civil Procedure, Section 1094.5. An Alternative Writ was issued [C. T. pp. 1-13; 72-73], but was subsequently discharged [C. T. pp. 62-63]. On appeal, the Court of Appeal of the State of California affirmed the judgment. The California Supreme Court granted a

hearing on or about January 25, 1967.[4] On April 19, 1967, the California Supreme Court filed its decision, holding that Dr. O'Reilly's authorization under the Exchange Visitor Program did not relieve him of the obligation to obtain the discretionary approval of the California Board of Medical Examiners under applicable California law and that he was therefore guilty of the chage pertaining to Drs. Ohnishi and Sanchez.[5]

In its decision, the California Supreme Court recognized that a State law incompatible with Federal law cannot be enforced and that enforcement of the State medical licensing laws was in fact incompatible with the Exchange Visitor Programs being offered to Drs. Sanchez and Ohnishi, stating at page 396:

> "There can be no question that to conduct the Exchange Program in compliance with the State medical regulation would frustrate to some extent the Program's foreign policy objectives. Effective practical training in general and traumatic surgery requires some treatment of patients (see Sections 2147, 2147.5, which authorize undergraduate and post-graduate medical students to perform medical functions in the course of their study). Such treatment would be permissible if the foreign doctor were licensed in California (see Section 2193) or if the program were conducted under the auspices of an approved medical school in compliance with the detailed requirements of Sections 2147.5 and 2147.6. Either of these alternatives, however, would impose burdens on the

[4]A certified copy of the California Supreme Court's Order granting a hearing is set forth as Exhibit D hereto.

[5]By reason of Dr. O'Reilly's bona fides, the Supreme Court reversed the judgment of the Trial Court and remanded the matter to the Board of Medical Examiners for reconsideration of the penalty.

foreign visitors that might be out of proportion to the benefits that they could expect to receive under the limited Exchange Programs contemplated under the Federal statute. *Either alternative would also expose the foreign visitor to rejection by the State Board for various reasons.*[6] Although it thus appears that to comply with State law a foreign visitor must either refrain from practicing medicine or comply with burdensome State regulations, we do not believe that the Federal statute supersedes State regulation." (Emphasis added).

In order to uphold the State licensing laws, the California Supreme Court then went on to find in effect that Congress intended to subordinate the Exchange Visitor Programs to the licensing laws of the various states.

In his Petition for Rehearing, Dr. O'Reilly contended that neither the legislative history nor the language of the Information and Educational Exchange Act of 1948, nor the language of the regulations promulgated thereunder, support the California Supreme Court's conclusion that Congress intended to subordinate the Exchange Visitor Program to the licensing laws of the then 48 states. It was argued that, to the contrary, Congress clearly intended that the Exchange Visitor Programs, as instruments of United States foreign policy, were intended to prevail over conflicting State laws.

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[6]As noted elsewhere in this Petition, under California law, the training institution, the student applicant and foreign applicants for licensure, are subject to the *discretionary approval* of the California Board of Medical Examiners. The exercise of such discretionary power in a manner which could thwart implementation of a Federal Program was expressly rejected in *Sperry v. State of Florida*, 373 U.S. at 385, and in *Miller v. Arkansas*, 352 U.S. at 190.

REASONS FOR GRANTING WRIT.

A. In Holding That the Federal Exchange Visitor Programs Are to Be Subordinated to the Medical Licensing Laws of the State of California, the Decision of the California Supreme Court Conflicts With Prior United States Supreme Court Decisions Interpreting and Applying the Supremacy Clause.

Petitioner contends that the decision of the California Supreme Court is in irreconcilable conflict with an unbroken line of decisions by the United States Supreme Court commencing with *Gibbons v. Ogden,* 9 Wheat. 1, 211, 6 L. Ed. 23, through such recent decisions as *Sperry v. Florida Ex rel. Florida Bar,* 373 U.S. 79 and *Leslie Miller Inc. v. Arkansas,* 352 U.S. 187.

See also:

Free v. Bland, 369 U.S. 663;

Public Utility Commission of California v. United States, 355 U.S. 543.

Moreover, the foreign relations of the United States have always been recognized as "the one aspect of our Government that from the first has been most generally conceded imperatively to demand broad national authority."

See:

United States v. Pink, 315 U.S. 203, 232;

Hines v. Davidowitz, 312 U.S. 52.

Of course, the Exchange Visitor Programs provided for in the United States Information and Educational

Exchange Act of 1948 is by its terms an instrument of United States foreign policy.

Enforcement of the California State licensing laws in the present case necessarily conflicts with the Exchange Visitor Program under which Drs. Ohnishi and Sanchez were admitted to the United States. As noted above, this was recognized and conceded in the decision of the California Supreme Court. Under California law the Board of Medical Examiners of the State of California retains the discretionary authority to approve medical training institutions (Business and Professions Code Section 2147, 2147.5, 2147.6), foreign post-graduate students (Section 2147.6) and applicants for licensure as medical doctors (Section 2193).[7] Thus, under the decision of the California Supreme Court, even though the Secretary of State had approved the Exchange Visitor Program to be conducted at the California Emergency Hospital under the direction of Dr. O'Reilly and had approved Drs. Ohnishi and Sanchez as trainees under said program, the Board of Medical Examiners could nevertheless exercise its discretionary authority to totally defeat implementation of the program in California.

The decision of the California Supreme Court in this regard comes into direct conflict with recent deci-

[7]Under Section 2193, the California Board of Medical Examiners could not admit a foreign graduate to licensure in California unless the country in which he had been licensed granted reciprocity to United States citizens. This could conflict with the provisions of 22 U.S.C. 1446, which vested a discretionary authority in the Secretary of State to waive strict reciprocity requirements.

sions of the United States Supreme Court such as *Sperry v. Florida, supra,* 373 U.S. 379, and *Miller v. Arkansas, supra,* 352 U.S. 187. As stated in *Sperry v. Florida* at page 385:

> "A state may not enforce licensing requirements which, though valid in the absence of Federal legislation give 'the State's licensing board a virtual power of review over the Federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by Federal license additional conditions not contemplated by Congress."

Recognizing the application of the Supremacy Clause, and acknowledging that implementation of the California licensing laws could wholly defeat the Exchange Visitor Program in the present case, the California Supreme Court nevertheless has ruled that the State medical licensing laws shall prevail. The California Supreme Court accomplished this result by finding a Congressional intention that the Exchange Visitor Programs should be subordinated to the medical licensing laws of the State of California. It is petitioner's contention that this finding of Congressional intent by the California Supreme Court is in error. This is discussed in the next section.

B. The Purpose and Legislative History of the Information and Educational Exchange Act of 1948, the Language of the Statute and the Regulations Issued Thereunder Are Inconsistent With a Congressional Intent to Subordinate the Enforcement and Implementation of the Act to Conflicting State Licensing Laws.

As noted above, the California Supreme Court decision held that, by application of California law, the Board of Medical Examiners had the discretionary authority to totally thwart implementation of the Exchange Visitor studies of Drs. Ohnishi and Sanchez. Nevertheless, the California Supreme Court concluded that it was the intent of Congress that the California Board of Medical Examiners (and presumably State licensing boards in each of the other States) could exercise such discretion to defeat implementation of any program which did not meet with its approval. It is submitted that no support for such an intention on the part of Congress can be found in the language of the statute or in its legislative history. To the contrary, it clearly appears that Congress did not intend to have the Program subordinated to the licensing laws in the various States, but chose to delegate to the Secretary of State wide discretion with a view to developing broad-gauged national programs and policies.

Thus, 22 U.S.C. Section 1446 provides that the persons authorized to enter the United States under Exchange Visitor Programs shall be admitted ". . . for such time and under such conditions as may be prescribed by regulations promulgated by the Secretary of State and the Attorney General." No qualifying language appears which would indicate an intention to

subordinate this delegation of authority to the various licensing laws of the then 48 states.

Moreover, the legislative history of the Act recognizes a national need for uniformity of policy and administration, a requirement which this Court has recognized as indicative of a Congressional preemptive intent that the Federal statute shall supersede conflicting state laws (see *Campbell v. Hussey,* 368 U.S. 297).

A Congressional wish for uniformity of policy and centralization of administration is reflected throughout the legislative history of the statute. The following extracts are noted from the Senate Report (S.R. No. 811, 80th Cong. 2d Sess.):

1. At page 4, in noting a separation between Information and Educational Exchange activities, Senate Report 811 states:

> "7. The Secretary of State and the Head of Mission in each country are the proper responsible authorities for these programs. . . . However, both at home and abroad, Information and Educational Exchange work . . . should be kept as distinct as necessary but *under broad-gauged leadership and policies.* This should prove a convenience also in enlisting the private resources of this country in the cooperation of American citizens abroad.
>
> "Such is the clear intent of the present Bill and amendments. . . ." (Emphasis added).

2. The Senate Report continues at pages 4-5:

> "8. The Department of State is urged to take into account, in the development of these programs, not only the considerations of our foreign policy but also the great varieties of peoples, habits,

and cultures in the world and to plan such public relations programs accordingly, . . . every effort should be made to reach as many leaders and people as possible. Likewise, *leadership and policy guidance must be exercised, at home and abroad,* so that no unwarranted unbalance, due to bureaucratic or professional enthusiasms, occurs between Information and Educational Exchange work, or between the various means of communications and methods." (Emphasis added).

3. In connection with participation by other Government agencies, the Senate Report states in part at page 8:

". . . the amendments do not alter the intent of the Bill to state clearly that the Secretary of State is authorized to utilize the service, facilities and personnel of the other Government Agencies . . . *and that the responsibility for coordination rests with the Secretary of State.* Other Governmental Agencies have notable contributions to make to these programs. . . . However, this bill is not an excuse for other Governmental Agencies to overextend their activities . . ." (Emphasis added). "In the interest of efficient administration it is assumed that the President would delegate to the Secretary of State the authority to approve such activities. . . ."

4. The Senate Report further recognizes the possibility that errors will be committed in the administration of the Program and prescribes as a safeguard, not the innumerable licensing laws of the various states, but continuing Congressional scrutiny and the advice

and guidance of the Advisory Committee created by the Statute (22 U.S.C. 1466-1468). Thus, Senate Report 811 states at page 6:

> "If the programs are as energetic, creative, and courageous as we hope them to be, there will be mistakes which sometimes happen to be dramatic.[8] However, criticism which reflects perspective and judgment cannot but help the programs, and should be applied especially in detecting any persistent tendencies toward ineffectiveness, distortion, or partisanship."

At page 7, under the heading Important Controls and Safeguards in the Act, it is noted that reports must be sent to Congress twice a year on the activities and expenditures under the Program, including appraisals of the results of the Program in foreign countries, and that the legislation could be terminated by concurrent resolution of the Congress. Under this heading, further reference is made to the two Advisory Commissions established by the Act to assist in the formulation and recommendation to the Secretary of State of policies and programs for carrying out the Act, and to the fact that these Commissions are to report semiannually to the Congress.

Similar concern for uniformity of administration appears in the Floor debates (Vol. 94, p. 249, Cong. Rec., 80th Cong., 2nd Sess., 1948), and in the sub-

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[8]A similar expression of opinion appears in the House of Representatives' Report (H. R. No. 416, 80th Cong. 1st Sess.), at page 8.

sequent legislative history of the Act (see 1961 Code Cong. and Admin. News, pages 2767-2768).

It is further submitted that, in promulgating implementing regulations under the Act, the Secretary of State retained all of the discretionary powers vested in him by the Congress. Thus, the regulations require that an application for program designation and program sponsor shall furnish such information, including program reports, institutional catalogs, letters of professional recognition, accreditation or approval, as the Secretary of State "may consider necessary in making his determination of the eligibility of the program to be designated as an Exchange Visitor Program." (22 C.F.R. 63.3(a)); and that the Secretary may *in his discretion* designate the sponsor's program as an Exchange Visitor Program and may *in his discretion* revoke such designation for any sufficient cause (C.F.R. 63.3(b). Similar broad discretionary powers are retained with reference to other aspects of the program (C.F.R. 63.5-63.6).

It is submitted that the language of the Information and Educational Exchange Act of 1948, its legislative history, and the regulations promulgated under it, clearly disclose a Congressional intention that Exchange Visitor Programs approved by the Secretary of State should supersede conflicting licensing laws of the various states, and that Congress never intended that any Federal programs could be thus thwarted or defeated by State licensing agencies.

Conclusion.

The decision of the California Supreme Court recognizes that enforcement of the various California licensing laws concerning medical students and doctors and medical training institutions vests broad discretionary powers in the California Board of Medical Examiners by which the State Board could have wholly defeated the Exchange Visitor Programs of Drs. Ohnishi and Sanchez. Recognizing the rule that conflicting State laws must yield to Federal Law unless Congress otherwise indicates, the California Supreme Court read into the Information and Educational Exchange Act of 1948 a Congressional intent that the Federal Programs should be subordinated to the medical licensing laws of the State of California. It is submitted that a fair reading of the Federal Act, its legislative history and the regulations issued under it fail to disclose such an intent, but rather disclose a clear Congressional intention that the Federal Programs in this important field of foreign relations should be developed and implemented under broad national policies and on a uniform basis, objectives which cannot be reconciled with an intention that the Federal Programs should be subordinated to conflicting State laws.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

KIRTLAND & PACKARD,
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APPENDIX A.

Opinion of the California Supreme Court.

[L.A. No. 29354. In Bank. Apr. 19, 1967.]

P. S. O'Reilly, Plaintiff and Appellant, v. Board of Medical Examiners of the State of California, Defendant and Respondent.

[On hearing after decision by the Court of Appeal, Second Appellate District, Division Four, Civ. No. 29096 (246 A.C.A. 899, 55 Cal.Rptr. 152) affirming judgment of the superior court. Judgment reversed with directions.]

Appeal from a judgment of the Superior Court of Los Angeles County, William E. MacFaden, Judge. Reversed with directions.

Proceeding in mandamus to set aside an order suspending a physician's license. Judgment denying writ reversed with directions to set aside order of revocation and to reconsider penalty in light of opinion.

Kirtland & Packard, Richard L. Kirkland, Walter N. Anderson and Ellis J. Horvitz for Plaintiff and Appellant.

Stanley Mosk and Thomas C. Lynch, Attorneys General, Stephen H. Silver and Conrad Lee Klein, Deputy Attorneys General, for Defendant and Respondent.

Traynor, C. J.—Plaintiff P. S. O'Reilly appeals from a judgment denying his petition for a writ of mandate to set aside an order of the Board of Medical Examiners.

On September 12, 1962, an accusation was filed with the Board of Osteopathic Examiners charging plaintiff with two violations of Business and Profes-

sions Code section 2392.[1] A hearing officer from the Office of Administrative Procedure held hearings on October 10 and December 20, 1962, and on March 11, 1963, filed a proposed decision finding cause for disciplinary action under section 2392. He recommended that plaintiff's license be revoked but that execution be stayed on the condition that plaintiff be placed on probation for five years and suspended from practice for 90 days. While the proceeding was pending plaintiff elected to become a licentiate of the Board of Medical Examiners (see Bus. & Prof. Code, § 2396) and that board renewed his physician's and surgeon's certificate on January 18, 1963. Thereafter, on January 22, 1964, the Board of Medical Examiners ratified the proceedings before the Board of Osteopathic Examiners and adopted the decision of the hearing officer.

Plaintiff then sought review of the board's order in the superior court. The court found that the proceedings of the medical board were within its jurisdiction, that the board's decision was supported by its findings, that the findings were supported by the weight of competent evidence, and that the penalty imposed was not an abuse of discretion. Accordingly, it denied relief.

We note at the outset that there is no merit in plaintiff's contention that he was denied due process when the medical board assessed the penalty against

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[1]Section 2392 provides: "The employing, directly or indirectly, of any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted or the aiding or abetting of any unlicensed person to practice any system or mode of treating the sick or afflicted constitutes unprofessional conduct within the meaning of this chapter." All further statutory citations are to the Business and Professions Code unless otherwise specified.

him on the basis of proceedings initiated before the osteopathic board. The matter was transferred to the Board of Medical Examiners after plaintiff had elected to cease being licensed by the osteopathic board and to become a licentiate of the medical board. "[D]ue process is not interested in mere technical formalism. It is the substance that is determinative of whether due process has been afforded." (*Cooper v. State Board of Medical Examiners,* 35 Cal.2d 242, 245 [217 P.2d 630, 18 A.L.R.2d 593].) The medical board ratified the prior actions of the osteopathic board, which complied fully with the procedures set forth in Government Code sections 11503, 11505 and 11509[2] Plaintiff was not injured by the transfer. To refile the accusation would have been an idle act, and to require the hearing officer to rehear the case would have been needlessly wasteful.

The first charge of unprofessional conduct concerned plaintiff's employment of Dr. Daniel Sanchez and Dr. Morimitsu Ohnishi, who were not licensed to practice medicine in California. Dr. Sanchez is a citizen of Mexico and received his medical degree there. Dr. Ohnishi is a citizen of Japan, where he received his medical degree and is a professor of medicine. Both doctors came to the United States under an exchange-visitor program, authorized by the United States Information and Educational Exchange Act of 1948, to serve as trainees in general and traumatic surgery. The Department of State had designated plaintiff's California Emergency

[2]Section 11503 requires the filing of an accusation specifying the statutes that have been violated and the facts that constitute the violation. Section 11505 requires that the respondent be served with the accusation and be notified of his rights to a hearing. Section 11509 requires notice to the respondent of the time and place of the hearing.

Hospital as an exchange-visitor program to provide training in general and traumatic surgery for qualified foreign medical students and had appointed plaintiff as the responsible officer of the program. The parties stipulated that on August 21, 1959, plaintiff aided and abetted Dr. Ohnishi in giving anesthetics to a patient and aided and abetted Dr. Sanchez in assisting in surgery upon the patient. From the foregoing facts the board concluded that plaintiff violated section 2392 by employing and aiding and abetting Dr. Ohnishi and Dr. Sanchez in the unlicensed practice of medicine.

Plaintiff contends that the board cannot discipline him for these activities, since they were undertaken pursuant to the federal exchange-visitor program. He asserts that the supremacy clause of the United States Constitution (art. VI, Cl. 2) precludes enforcement of the state licensing laws in this case, on the ground that such enforcement would interfere with the federal exchange program. We do not agree with plaintiff's contention.

Since a state law that is incompatible with federal law cannot be enforced (*United States v. Pink,* 315 U.S. 203, 230-232 [86 L.Ed. 796, 817-819, 62 S.Ct. 552]; *United States v. Belmont,* 301 U.S. 324, 331-332 [81 L.Ed. 1134, 1139-1140, 57 S.Ct. 758]), the controlling question is whether section 2392 is incompatible with the federal program.

The exchange-visitor program was established by *the United* States Information and Educational Exchange Act of 1948 (62 Stat. 6).[3] Congress declared

[3]This statute was repealed by Public Law 87-256, §111(a)(2), 75 Stat. 538 (1961) and the program was consolidated with other similar programs by Public Law 87-256, 75 Stat. 527-38 (1961), 22 U.S.C. §§2451-58 (1964).

its purpose to be "to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries" by, among other things, establishing an interchange of persons, knowledge and skill. (See 62 Stat. 6, § 2.) The Secretary of State was authorized to provide for the interchange between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill. (See 62 Stat. 7, § 201.) The Secretary was directed to use "existing reputable agencies," preferably private rather than governmental, in setting up the program for foreign visitors. (See 62 Stat. 7, 14, §§ 201, 1005.) In addition he was empowered to prescribe and enforce the conditions under which the foreign visitors were to be admitted to this country. (See 62 Stat. 7, § 201.)

Pursuant to this delegation of authority, the Secretary established different classes of exchange-visitor programs, including programs sponsored by hospitals and related institutions. (See 22 C.F.R. § 63.3 (c)(1).) Under the regulations those who wish to sponsor a program must apply to the Secretary for approval, and in reviewing the application the Secretary considers professional organizations' appraisal of the quality of a particular program. (See 22 C.F.R. §§ 63.2(a), 63.3(a).) The Secretary also can revoke the approval for sufficient cause including failure to maintain educational standards established by competent professional agencies. (See 22 C.F.R. § 63.3(b).) Once approved, the sponsor has the primary responsibility for recruiting exchange visitors and must provide them with

a form specifying the purpose, direction and condition of the visit. (See 22 C.F.R. § 63.4.) This form enables the visitor to obtain his visa from the American consul in his native country.

Dr. O'Reilly applied for approval as a sponsor of an exchange-visitor program and in support of his application filed letters from the American College of Osteophatic Surgeons and the American Osteopathic Association attesting to the nature and quality of his hospital program. The Secretary designated plaintiff as a sponsor of a program to provide training in general and traumatic surgery for qualified foreign medical students and a three-year course in clinical laboratory for qualified foreign students. Thereafter, plaintiff recruited Drs. Ohnishi and Sanchez to participate in his program as trainees in traumatic and reconstructive surgery with special emphasis in reconstruction of the hand and forearm.

There can be no question that to conduct the exchange program in compliance with the state medical regulation would frustrate to some extent the program's foreign policy objectives. Effective practical training in general and traumatic surgery requires some treatment of patients. (See §§ 2147, 2147.5, which authorize undergraduate and post-graduate medical students to perform medical functions in the course of their study.) Such treatment would be permissible if the foreign doctor were licensed in California (see § 2193) or if the program were conducted under the auspices of an ap-

proved medical school in compliance with the detailed requirements of sections 2147.5 and 2147.6. Either of these alternatives, however, would impose burdens on the foreign visitors that might be out of proportion to the benefits that they could expect to receive under the limited exchange programs contemplated under the federal statute. Either alternative would also expose the foreign visitor to rejection by the state board for various reasons. Although it thus appears that to comply with state law a foreign visitor must either refrain from practicing medicine or comply with burdensome state regulations, we do not believe that the federal statute supersedes state regulation.

The basic problem is one of accommodating the foreign policy objectives of the exchange programs with the interests of the patients who might be treated by the visiting doctors. Congress has the power to make this accommodation even though the power to regulate the practice of medicine is ordinarily committed to the states. (*Linder v. United States,* 268 U.S. 5, 18 [69 L.Ed. 819, 823, 45 S.Ct. 446, 39 A.L.R. 229]; cf. *Sperry v. Florida,* 373 U.S. 379, 385 [10 L.Ed.2d 428, 432, 433, 83 S.Ct. 1322].) It canot be lightly assumed, however, that in establishing the exchange program, Congress intended to deprive patients of the protection of state regulation. Had it so intended, we are convinced that it would have provided an effective alternative to protect patients of visiting doctors. The federal program does not provide effective patient protection. A prospective sponsor need only secure sum-

mary recommendation from professional groups (see 22 C.F.R. § 633(a)), and the selection of the visitors is controlled largely by the sponsors, not the federal authorities. Finally we note that our conclusion that state regulation is not superseded is supported by the only administrative interpretation we have been able to find.[4]

Plaintiff also contends that under state law the federal enactment is a statutory basis for an implied exception to the state regulations pursuant to which the visitors could lawfully perform medical acts. He invokes *Magit v. Board of Medical Examiners,* 57 Cal.2d 74 [17 Cal.Rptr. 488, 366 P.2d 816], in which we recognized that with a statutory basis for an exception, persons not licensed to practice medicine may perform some medical acts. The reasoning of the *Magit* case, however, was based on the interrelationship of the state licensing provisions applicable to doctors and nurses, and there is nothing in that case or in the legislative scheme to support an exception to the prohibition of

[4]"In approving any particular exchange program, I assume, as the responsible officer of the Department of State, that the sponsor will be aware of and comply with the applicable federal, state and local laws." (Letter from Culver E. Gidden, Chief, Facilitative Services Staff, Bureau of Educational and Cultural Affairs, Department of State, to Warren H. Deering, Deputy Attorney General, December 11, 1964.) Plaintiff contends that the word "applicable" in this letter begs the basic question, namely, what laws are applicable? Since the letter was written in response to an inquiry from the Attorney General about the applicability of state law to plaintiff's exchange program, we doubt that Mr. Gidden meant to avoid the inquiry by begging the question. We believe he meant that federal, state, and local laws that would ordinarily apply remained applicable to the sponsor of any exchange program.

unlicensed practice based on a federal rather than a state statute.

The second charge of unprofessional conduct involves plaintiff's employment of William Thomas Duffy, who was a graduate of the California College of Medicine but was not licensed to practice medicine in California. Mrs. Beatrice Gowdy testified that Duffy diagnosed an injury to her knee and treated it on several occasions at plaintiff's hospital. On no occasion had plaintiff examined her or been present while she was being treated. Plaintiff testified, however, that he had examined Mrs. Gowdy on several of her visits and had made the diagnosis and that Duffy had consulted him before administering each treatment.

The board found that plaintiff employed Duffy and that Duffy practiced "a system of treatment in the diagnosis and treating of one Beatrice Gowdy." It further found that Duffy consulted with plaintiff before applying diathermy and other treatment and that plaintiff was not present during the treatments.

Plaintiff contends that the evidence and findings do not support the conclusion that he employed Duffy to practice medicine. There is, however, substantial evidence to the contrary. In administering the treatments to Mrs. Gowdy, Duffy performed medical functions and his consultations with plaintiff did not make his actions lawful. Although section 2665, subdivision (a), allows a full time assistant to administer physical therapy under a licensed person's "orders, directions and

supervision," there is no evidence that plaintiff attempted to provide the supervision required by this section. In addition, Mrs. Gowdy testified that plaintiff had never seen her. These facts justify the conclusion that Duffy had diagnosed and treated Mrs. Gowdy and that he was employed to do so.

Finally, plaintiff contends that even if the charges are sustained by the evidence, the punishment is excessive. Although good faith is not a defense (see *Magit v. Board of Medical Examiners, supra,* 57 Cal.2d 74), we believe that the uncertainty surrounding the question of federal preemption and plaintiff's apparent good faith in allowing the foreign doctors to assist him preclude any punishment greater than probation for the violation involving the exchange program. (See *Magit v. Board of Medical Examiners, supra*; *Harris v. Alcoholic Beverage etc. Appeals Board,* 62 Cal.2d 589, 594-595 [43 Cal.Rptr. 633, 400 P.2d 745]; *Brown v. Gordon,* 240 Cal.App.2d 659, 666-667 [49 Cal. Rptr. 901]; cf. *Hildebrand v. State Bar,* 36 Cal.2d 504, 514 [225 P.2d 508].)

Since a single penalty was imposed for both violations we have no way of knowing the extent to which the board relied upon the first violation in imposing the 90-day suspension. Accordingly, the case must be remanded to the board for reconsideration of the penalty assessed. (See *Cooper v. State Board of Medical Examiners,* 35 Cal.2d 242, 252 [217 P.2d 630, 18 A.L.R.2d 593]; *Garfield v. Board of Medical Examiners,* 99 Cal.App.2d 219, 231-232 [221 P.2d 705].)

The judgment is reversed, and the trial court is directed to enter judgment ordering respondent board to set aside its order of revocation and to reconsider the penalty in the light of this opinion.

Peters, *J.*, Tobriner, *J.*, Burke, *J.*, Sullivan, *J.*, and White, *J.*,* concurred.

McComb, *J.*—I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Kingsley in the opinion prepared by him for the Court of Appeal in *O'Reilly v. Board of Medical Examiners* (Cal. App.) 55 Cal.Rptr. 152.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B.[1]

(CAPTION OMITTED)

Washington, Thursday May 14, 1959

Title 22—FOREIGN RELATIONS

Chapter 1—Department of State

[Dept. Reg. 108,399]

Part 63—Exchange-Visitor Program

Part 63, Chapter I, Title 22 of the Code of Federal Regulations is amended to read as follows:

Sec.

63.1 Definitions.

63.2 Application for Exchange-Visitor Program designation.

63.3 Action on applications for Exchange-Visitor Program designation.

63.4 Notification to exchange visitors.

63.5 Applications for change of status to exchange visitor, extensions, and program transfers.

63.6 Requests for waiver of provisions of Public Law 555, 84th Congress.

63.7 Action by Secretary on requests for waiver of provisions of Public Law 555, 84th Congress.

Authority: §§63.1 to 63.7 issued under sec. 4, 63 Stat 111; 5 U.S.C. 151c. Interpret or apply secs. 201, 1005, 1009, 62 Stat. 7, 14; 2 U.S.C. 1446, 1437, 1440.

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[1]This document appears in the Administrative Record as Exhibit "B-10".

Cross References: For consular procedure with respect to issuance of visas to exchange visitors, see §41.41 of this chapter.

§63.1 *Definitions.*

(a) As used in this part the term "Act" refers to the United States Information and Educational Exchange Act of 1948, as amended.

(b) As used in this part the term "sponsor" means any existing reputable United States agency or organization or recognized international agency or organization having United States membership and offices which makes application as hereinafter prescribed to the Secretary of State for designation of a program under its sponsorship as an "Exchange-Visitor Program."

(c) As used in this part, the term "Exchange-Visitor Program" means a program of a sponsor designed to promote interchange of persons, knowledge and skills, and the interchange of developments in the field of education, the arts, and sciences, and concerned with one or more of the categories of exchange visitors defined in paragraph (g) of this section, which has been designated as such by the Secretary of State, and in actual operation serves to promote mutual understanding between the people of the United States and the people of other countries.

(d) As used in this part, the term "Secretary" means either the Secretary of State or an officer duly designated by him.

(e) As used in this part, the term "Department" means the Department of State.

(f) As used in this part the term "cooperating country" means any country with which the Department is authorized to conduct exchange of persons under the provisions of section 201 of the Act.

(g) As used in this part the term "exchange visitor" means any foreign national who has been selected by a sponsor to participate in an Exchange-Visitor Program and who is seeking to enter or has entered the United States temporarily in one of the following categories:

(1) A "student", for the purpose of study, research, or training at or under the auspices of, an established school or institution of learning, or

(2) A "trainee," for the purpose of obtaining practical training in a specialized field of knowledge and skill in a nonacademic institution or agency, or

(3) A "teacher," for the purpose of teaching in established primary or secondary schools, or established schools offering specialized instruction, or

(4) A "guest instructor", for the purpose of imparting knowledge through lectures or special instruction, or

(5) A "professor", for the purpose of teaching or advanced research, or both, in an established institution of higher learning, or

(6) A "leader in a field of specialized knowledge or skill", for purposes of observation, consultation, advanced research or training or the sharing of such specialized knowledge or skill.

(h) As used in this part the term "participant" means a foreign national who has effected his admission into the United States as an exchange visitor or

who has acquired exchange-visitor status after admission.

§63.2 Application for Exchange-Visitor Program designation.

(a) Any sponsor may apply to the Secretary for designation of a program under its sponsorship as an Exchange-Visitor Program. Such application shall be made on Form DSP-37, "Exchange-Visitor Program Application." The application shall be completed in all details and shall be submitted to the Secretary.

(b) Each sponsor shall assume, inter alia, in the application the obligation to:

(1) Notify the District Director of the Immigration and Naturalization Service having administrative jurisdiction over the participant's place of temporary residence when (i) a participant has completed the sponsor's program and is scheduled to depart from the United States or to transfer to another Exchange-Visitor Program, or (ii) a participant has ceased to engage in the activity for which he was admitted and to maintain exchange-visitor status.

(2) Instruct any participant requiring a temporary extension of stay to apply to the Immigration and Naturalization Service at least 30 days before the expiration of the participant's stay and provide the participant requiring the extension with written evidence showing the period and terms of the extension desired.

(3) Provide any participant proposing to transfer to another Exchange-Visitor Program with a release in writing which will certify to the need or desirability of further Exchange-Visitor Program participation.

§63.3 Action on applications for Exchange-Visitor Program designation.

(a) *Evidence.* An application for program designation on Form DSP-37 submitted to the Secretary shall be examined to ascertain the adequacy of the information furnished. If sufficient information has not been furnished, the sponsor shall be requested to supply information in which the application is deficient. In addition to the information furnished on the Form DSP-37, the Secretary may require a sponsor to present any evidence of a documentary nature, e.g., program reports, institutional catalogues, letters of professional recognition, accreditation, or approval, which he may consider necessary in making his determination of the eligibility of the program to be designated as an Exchange-Visitor Program.

(b) *Decision by the Secretary.* Upon receipt and consideration of the Form DSP-37, including any required additional evidence, the Secretary may in his discretion designate the sponsor's program as an Exchange-Visitor Program. The Secretary will notify the sponsor in writing of his decision. The Secretary may in his discretion revoke designation of an Exchange-Visitor Program for any sufficient cause, including but not restricted to: (1) Failure to maintain educational standards as established by competent professional agencies; (2) failure to submit reports on program operation when requested by the Secretary; (3) misuse of the Exchange-Visitor Program.

(c) *Assignment of serial number.* (1) If designation is made, the program will be assigned a number within one of the following series:

G-I—Programs sponsored by the International Educational Exchange Service.

G-II—Programs sponsored by the International Cooperation Administration.

G-III—Programs sponsored by the United States Information Agency.

G-IV—Programs sponsored by international agencies or organizations.

G-V—Programs sponsored by national, state, or local governmental agencies.

P-I—Programs sponsored by educational institutions such as schools, colleges, universities, seminaries, libraries, museums, and institutions devoted to scientific and technological research.

P-II—Programs sponsored by hospitals and related institutions.

P-III—Programs sponsored by non-profit associations, foundations, and institutes.

P-IV—Programs sponsored by business and industrial concerns.

P-V—Programs sponsored by host institutions and organizations to international conferences, congresses, and symposia.

(2) The sponsor will thereafter refer to the serial number in any correspondence with the Secretary, consular officers, or the Immigration and Naturalization Service concerning the Exchange-Visitor Program or any individual included in such program.

(d) *Notification to consuls and the Immigration and Naturalization Service.* When a program has been designated as an Exchange-Visitor Program, the American consular officers concerned and the Commissioner of Immigration and Naturalization shall be notified by

the Department of the sponsor, serial number, and nature and purpose of the program.

§63.4 Notification to exchange visitors.

The officer designated as the Responsible Officer of an Exchange-Visitor Program shall execute a Form DSP-66, "Certificate of Eligibility for Exchange-Visitor Status," in a single original copy and furnish it to each selected exchange visitor for presentation to the American consular office in applying for a visa. The Responsible Officer is required to furnish in the Form DSP-66 the time and terms of the proposed exchange visit which must be demonstrably within the scope of the designated Exchange-Visitor Program concerned. The exchange visitor must present a Form DSP-66 properly filled out by the sponsor and must personally execute the reverse to be eligible for a visa and must present, at the port of entry, Form DSP-66 endorsed by the consular officer issuing the visa to be eligible for admission into the United States.

§63.5 Applications for change of status to exchange visitor, extensions, and program transfers.

(a) *Application for change of status to exchange visitor.* Such application shall be made by the prospective exchange visitor who has been admitted into the United States in one of the nonimmigrant classifications specified in 101(a)(15) of the Immigration and Nationality Act and who has maintained bona fide nonimmigrant status to the office of the Immigration and Naturalization Service nearest the alien's place of temporary residence. The application must be accompanied by a Form DSP-66 properly executed by the sponsor and the prospective exchange visitor. The Immigration

and Naturalization Service officer to whom application is made may request the views of the Department prior to the granting of the change of status in those cases in which (1) the applicant has resided in the United States for a period of one year or longer immediately preceding his application, or (2) the officer cannot determine from the evidence submitted that the program activity proposed for the applicant is clearly within the scope of the designation of the Exchange-Visitor Program concerned, or that the selection procedures agreed upon between the sponsor and the Department of State at the time of the designation have been followed.

(b) *Application for extension of stay.* Such application shall be made at least 30 days before the expiration of the exchange visitor's authorized stay to the District Director of the Immigration and Naturalization Service having administrative jurisdiction over the exchange visitor's place of temporary residence. The application shall be accompanied by the Form DSP-66 with which the exchange visitor originally obtained status, properly endorsed by the sponsor to show the time and terms of the extended stay for which application is made. If the application falls within one of the categories of cases which the Department has advised the Immigration and Naturalization Service are questionable from an exchange point of view, or should be subject to special checks, the Immigration and Naturalization Service may refer the application to the Department for its views prior to action on the application.

(c) *Application for program transfer.* An application for permission to transfer from one designated Exchange-Visitor Program to another must be submitted to the District Director of the Immigration and Nat-

uralization Service nearest the exchange visitor's place of temporary residence by the exchange visitor concerned at least thirty days before participation in the program to which the exchange visitor wishes to transfer is scheduled to begin. Any application for program transfer must be accompanied by a duly executed Form DSP-67, "Certificate of Eligibility for Program Transfer of Exchange Visitor." Before granting the exchange visitor permission to transfer, the District Immigration and Naturalization Service Office concerned may request the views of the Department as to whether a proposed transfer is in the best interests of international exchange in any case in which the applicant is unable to present a certificate of release from the current sponsor, in which it appears that the transfer is solely or principally for the purpose of continuing the residence and employment of the exchange visitor in the United States, or in which the officer cannot perceive clear progress toward an educational objective.

§63.6 Requests for waiver of the provisions of Public Law 555, 84th Congress.

(a) Public Law 555, 84th Congress, provides in part that no person admitted as an exchange visitor or acquiring exchange-visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 101(a)(15)(H) of the Immigration and Nationality Act, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for a total of at least two years following departure from the United States, except that

upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive the residence abroad requirement in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest.

(b) An exchange visitor desiring to apply for a waiver shall follow procedures and/or regulations established by the Government agency interested in his case.

(c) An applicant for a waiver should arrange for a separate report on his application to be made by the sponsor or sponsors directly to the interested Government agency and to the Secretary of State.

(d) A request for waiver submitted by an agency of the United States Government to the Secretary for his recommendation shall recite the facts concerning the country of origin and the admission and stay in the United States of the exchange visitor or former exchange visitor; identify his sponsor or sponsors by name and program number; name the place of his intended residence in the United States; and state the reason or reasons why the waiver is being requested.

(e) The request must be supported by documentary evidence demonstrating that admission of the exchange visitor for permanent resident status or for nonimmigrant status under section 101(a)(15)(H) of the Immigration and Nationality Act is in the public interest because the two-year period of residence abroad would (1) impose undue hardship upon an exchange visitor who is the spouse of a United States citizen or of a lawfully resident alien that he could not have anticipated at the time he acquired exchange-visitor status or when

he accepted the last extension of stay as an exchange visitor, or (2) be clearly detrimental to a program or activity of official interest to an agency of the Government of the United States.

(f) An exchange visitor who wishes to apply for a waiver under paragraph (c)(1) of this section may apply to the District Director of the Immigration and Naturalization Service having administrative jurisdiction over his intended place of residence in the United States or, if the exchange visitor is abroad, to an American consular officer. If after consideration of an application the Immigration and Naturalization Service views it favorably, it shall transmit its request to the International Educational Exchange Service for the Secretary's recommendation. An American consular officer receiving an application for waiver shall forward it to the Department for the Secretary's consideration and recommendation. An exchange visitor who wishes to apply for a request for waiver under paragraph (e)(2) of this section may apply to the agency interested in his case. If the interested agency views his case favorably it shall transmit its request to the International Educational Exchange Service for the Secretary's recommendation.

§63.7 Action by the Secretary on requests for waiver of the provisions of Public Law 555, 84th Congress.

Upon receipt of a request from an interested agency of the United States Government that the residence abroad requirement of Public Law 555, 84th Congress, be waived in the case of an exchange visitor or former exchange visitor, the Secretary shall review the policy, program, and foreign relations aspects of the case and

in appropriate cases shall transmit his recommendation to the Attorney General for the latter's finding and consequent action.

Dated: April 29, 1959.

John N. Hayes,
Acting Director, International Educational Exchange Service.

[F.R. Doc. 59-4058: Filed, May 13, 1959; 8:47 a.m.]

APPENDIX C.

This Appendix C sets forth the text of the following numbered sections of the Business and Professions Code of the State of California:

§ 2147. *Exemptions; uncompensated students.* Nothing in this chapter shall be construed to prevent a student regularly matriculated in any legally chartered school approved by the board from treating, without compensation to the student, the sick or afflicted as a part of his course of study. (Added Stats.1937, c. 414, p. 1377.)

§ 2147.5 *Students compensated by hospital or school; instructors, resident physicians and assistant residents.* Any graduate student registered with the board and upon whom a degree of doctor of medicine, bachelor of medicine, or doctor of osteopathy has been conferred by a school, approved by the board, and any regularly matriculated student in a school approved by the board may, during and as a part of his course of study, but not for a period of more than two years, treat the sick and afflicted either as such student in a school approved by the board, teaching medicine, surgery or osteopathy in this State, or as an interne in a hospital approved for the training of internes, and may, for rendering such treatment, receive compensation therefor from the hospital or school. Hospitals functioning as a part of the teaching program of an approved school in this State may exchange instructors or resident or assistant resident physicians with an out-of-state approved school, or may appoint a graduate of an approved school as a resident or assistant resident for postgraduate training, and the exchange instructor, resident or assistant resident from such out-of-state

school or the resident or assistant resident for post-graduate training may, for a period not exceeding one year, serve as an instructor, resident or assistant resident in such hospital in this State. Any person registered with the board and upon whom a degree of doctor of medicine or doctor of osteopathy has been conferred by a school approved by the board may act as a resident or assistant resident physician in any hospital or public health department approved for residencies or the training of internes, and may receive compensation therefor from the hospital or public health department; provided, that any such resident or assistant resident shall qualify for and take the next succeeding examination for a physician's and surgeon's certificate given by the board or shall qualify for and receive a physician's and surgeon's certificate by one of the other methods specified in this chapter. If he shall fail to pass such examination or fail to receive a certificate by one of the other methods, pending the results of the examination, all privileges under this section shall automatically cease.

Except to the extent authorized by this section, no graduate student or resident may treat the sick or afflicted or receive compensation therefor, or otherwise engage in or offer to engage in the practice of medicine or surgery; unless he shall hold a valid, unrevoked and unsuspended physician's and surgeon's certificate. (Added Stats. 1939, c. 341, p. 1681, § 1, as amended Stats.1947, c. 867, p. 2041, § 1; Stats.1951, c. 143, p. 398, § 5; Stats.1955, c. 95, p. 562, § 1.)

§ 2147.6[1] *Foreign postgraduate students.* Physicians, with valid visitors' visas issued by the United States of America, who seek postgraduate study in an approved medical school either as a fellow, instructor, or exchange professor, may, after proper application to and approval by the board and receipt of an appointment from the dean of the approved medical school, be permitted by the board to participate in the professional activities of the department in the approved medical school to which they are appointed under the direction of the chairman of the department. Such permission granted by the board shall be for a period not in excess of one year, and must be renewed semiannually. Except to the extent authorized by this section, no such visiting physician may treat the sick or afflicted or receive compensation therefor or otherwise engage in or offer to engage in the practice of medicine and surgery. (Added Stats.1953, c. 101, p. 820, § 1.)

§ 2193. *Applicants from foreign medical schools.* An applicant who does not qualify under Section 2193.5 of this chapter and whose application is based on a diploma issued to him by a foreign medical school, except a Canadian school, shall furnish documentary evidence, satisfactory to the board, that:

(a) He has completed in a medical school or schools a resident course of professional instruction equivalent to that required in this article for a physician and surgeon applicant.

---

[1]This section was amended in 1965 (Stats. 1965c 579, page 1907, Section 1). By the amendment, the permission granted by the Board of Medical Examiners under Section 2147.6 could be for a period not in excess of 5 years; the required semi-annual renewal was subject to the discretion of the Board; and the time spent in an approved medical school pursuant to Section 2147.6 was declared not to be available to satisfy the requirements of Sections 2193 and 2193.5.

(b) Subsequent thereto, he has had issued to him by such medical school, a medical diploma, as evidence of the completion of the course of medical instruction required in this chapter.

(c) He has been admitted or licensed to practice medicine and surgery in the country wherein is located the institution in which he has completed the resident courses of professional instruction required under this chapter.

(d) The country in which he has been licensed to practice medicine and surgery as required under subdivision (c) of this section will admit to practice therein citizens of the United States upon proof of prior admission to practice medicine and surgery in some state of the United States or upon proof of matters similar to the requirements in this section for graduates of foreign medical schools.

Applicants under this section must serve at least two years in a service satisfactory to the board in a hospital or hospitals located in the United States and approved by the board for the training of interns, one year of which must be in a hospital in this State. Before a certificate may be issued, the applicant must not only meet the requirements of subdivisions (a), (b), (c) and (d) of this section but must also pass the written examination as provided under Article 10 of Chapter 5 of Division 2 of this code[1] prior to commencing an internship in a hospital in this State, and must also pass an oral and clinical examination at the satisfactory completion of the two-year internship.

Nothing contained in this section shall prohibit the board from disapproving any foreign medical school nor from denying the application if, in the opinion of

the board, the instruction received by the applicant or the courses were not equivalent to that required in this article for a physician and surgeon applicant. (Added Stats.1937, c. 414, p. 1377, as amended Stats.1939, c. 281, p. 1537, § 2; Stats.1941, c. 751, p. 2287, § 1; Stats.1949, c. 530, p. 930, § 1; Stats.1951, c. 239, p. 500, § 1; Stats.1955, c. 1538, p. 2819, § 1.)

§ 2392. *Employment of suspended or unlicensed practitioner; aiding unlicensed person.* The employing, directly or indirectly, of any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted or the aiding or abetting of any unlicensed person to practice any system or mode of treating the sick or afflicted constitutes unprofessional conduct within the meaning of this chapter. (Added Stats.1937, c. 414, p. 1377.)

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IN THE

Supreme Court of the United States

October Term 1967
No. 378 Misc.

P. S. O'REILLY, M.D.,

Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Court of the State of California (Appendix "A" of Petition) is reported at 66 A.C. 391 (decided April 19, 1967). The Supreme Court of the State of California denied petitioner's Petition for Rehearing.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether petitioner was guilty of unprofessional conduct by aiding and abetting the performance of medical

functions[1] by two foreign individuals not licensed by respondent to practice medicine in the State of California, whom petitioner had selected to come into the United States as "students" to participate in the exchange-visitor program which petitioner had established pursuant to the provisions of the United States Information and Educational Exchange Act of 1948 (62 Stat. 6),[2] for the purpose of providing training in surgery for qualified foreign medical students in the United States in their respective field?

A necessary corollary to that question is whether Congress intended that these unlicensed individuals be permitted to perform such medical functions upon citizens of the State of California without their moral, educational and experience requirements first having been examined by any responsible and qualified reviewing agency?

Constitutional Provisions, Statutes and Regulations Involved.

In addition to the pertinent provisions of law referred to in the Petition, it should be noted that the United States Information and Educational Exchange Act of 1948 was repealed in 1961,[3] and the entire exchange-visitor program was consolidated with related and similar programs.[4] These provisions appear in Title 22, United States Code, sections 2451 to 2458.

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[1]All reference in this brief to the term "medical functions" is to that term as it is used in section 2392 of the Business and Professions Code of the State of California; *i.e.*, "the practice of any system or mode of treating the sick or afflicted."

[2]This statute was repealed by Public Law 87-256, section 111-(a)(2), 75 Stat. 538 (1961).

[3]See footnote 2, *supra*.

[4]Pub. L. 87-256, 75 Stat. 527-38 (1961).

Also, the federal regulations set forth in Appendix "B" to the Petition, while applicable to the facts of the instant case, have since been amended. The present regulations are still contained in Part 63 of Chapter 1 of Title 22 Code of Federal Regulations.

Statement of the Case.

In 1957, petitioner applied to the State Department of the United States for approval to become a sponsor of an exchange-visitor program under the provisions of the United States Information and Educational Exchange Act of 1948 and the rules and regulations promulgated pursuant thereto. [Ex. B-3, Adm. Tr. Vol. I, p. 22.][5] The aforementioned Act had authorized the Secretary of State to provide for the interchange between the United States and other countries of students, trainees, teachers, guest instructors, and leaders in fields of specialized knowledge or skill. (See 62 Stat. 7 § 201.) The Secretary had been directed to use "existing reputable agencies," preferably private, as opposed to governmental, in organizing the program. (See 62 Stat. 7, 14 §§ 201, 1005.) Furthermore, he had been authorized to prescribe and enforce the conditions under which the foreign visitors were to be admitted into the United States. (See 62 Stat. 7 § 201.) As a result of this delegation of authority the Secretary had proceeded to create programs which were to be sponsored by hospitals and related institutions. (See 22 C.F.R. § 63.3(c)(1).)

When the Secretary of State received petitioner's application he considered letters from professional organ-

[5]"Adm. Tr." refers to the Reporter's Transcript of the Administrative Proceedings.

izations discussing the nature and quality of the prospective program which petitioner had submitted in support of his application. [Exs. B-1, B-2.] The Secretary approved the application [Ex. B-6] and officially described petitioner's program as follows:

> "A program to provide (1) training in general and traumatic surgery at the California Emergency Hospital for qualified foreign medical students and (2) a three-year course in clinical laboratory for qualified foreign students, to make it possible for such students to obtain training in the United States in their respective fields, in the general interests of international exchange in the arts and sciences." [Ex. B-7.]

Thereafter, petitioner recruited Morimitsu Ohnishi and Daniel Sanchez to participate in his program, pursuant to section 63.4 of Ttitle 22 of the Code of Federal Regulations. [Exs. B-17, B-19.] Petitioner indicated that each of these gentlemen was to participate in his program as a trainee in traumatic and reconstructive surgery with special emphasis in reconstruction of the hand and forearm. Petitioner was to pay each individual $300 per month and furnish room and board. [Adm. Tr. Vol. I, pp. 19-20; Exs. B-15, B-19.]

Neither Ohnishi nor Sanchez held any healing arts license in the State of California. This was known by petitioner at all times. [Adm. Tr. Vol. I, p. 9.]

On August 21, 1959, Ohnishi gave anesthetics to and Sanchez assisted in surgery on Clinton Inghram,

who was a patient at petitioner's hospital.[6] [Adm. Tr. Vol. I, pp. 9-10.] The actions of Sanchez and Ohnishi on this occasion were performed under petitioner's direction and control and in petitioner's presence. [Adm. Tr. Vol. I, pp. 9, 21.] Neither petitioner nor anyone on his behalf had informed respondent, the Board of Osteopathic Examiners, or any of their agents, that Ohnishi or Sanchez were participating in the exchange-visitor program. [Adm. Tr. Vol. I, p. 12.]

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[6]These acts constitute the performance of medical functions, within the meaning of section 2392 of the Business and Professions Code of the State of California. *Magit v. Board of Medical Examiners,* 57 Cal. 2d 74, 81, 84 (1961) [17 Cal. Rptr. 488, 366 P. 2d 816].

ARGUMENT.

The law is clear that where the area involved is a matter of fundamental local concern, such as the practice of medicine, a state has the right to legislate in that field in order to protect its citizens unless (1) Congress, while lawfully exercising one of its constitutional powers, has expressly indicated that it intends to oust the states from that area, or (2) such a lawful exercise of a constitutional power by Congress directly conflicts with the state legislation. *Head v. New Mexico Board,* 374 U.S. 424, 431-32 (1963); *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1963). The applicable federal statutes involved herein, as well as the regulations enacted pursuant thereto, fail to contain any language indicating a clear desire on the part of Congress to preempt the field of regulating the practice of medicine by foreign individuals within the confines of the respective sovereign states. Therefore, respondent's actions interpreting and enforcing section 2392 of the Business and Professions Code of the State of California must be upheld unless petitioner is able to show that the application of that statute has directly conflicted with the provisions of the United States Information and Educational Exchange Act and the Regulations enacted pursuant thereto.

I.

There Is No Direct Conflict Between the Federal and State Legislation Involved Herein.

As part of the process of ascertaining whether there is a conflict between the federal and state legislation involved herein, this Court will be required to interpret the intent of Congress in enacting the United States

Information and Educational Exchange Act of 1948. In this regard, this Court is bound to apply the established principle of statutory construction that, where a serious doubt of constitutionality is raised, the statute should be construed so as to avoid deciding that question. *Lynch v. Overholser,* 369 U.S. 705, 710-11 (1962); *Ullmann v. United States,* 350 U.S. 422, 433 (1956); *United States v. Rumely,* 345 U.S. 41, 45, 47 (1953); As was said in *Rumely:*

> "[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *United States v. Rumely,* 345 U.S. 41, 45 (1953).

Serious doubts of constitutionality would arise if this Court were to follow petitioner's suggestions and conclude that when Congress enacted the federal statute it intended to permit "student trainees." such as Ohnishi and Sanchez, to perform medical functions as part of their training program. This is true because, under the Tenth Amendment to the United States Constitution, each state possesses plenary power in governing the practice of medicine within its boundaries. *Barsky v. Board of Regents,* 347 U.S. 442, 449 (1954); *Linder v. United States,* 268 U.S. 5, 18 (1925); *Schlessing v. United States,* 239 F. 2d 885, 886 (9th Cir. 1956); *United States v. Article Consisting of 2 Devices, Etc.,* 255 F. Supp. 374, 381 (W. D. Ark. 1966). While it is true that congress possesses broad power in regulating the field of foreign relations, it should be noted that such power is not without limitation. See *Afroyim v. Rusk,* ..... U.S. ..... (1967) [87 S. Ct. 1660, 18 L. Ed. 2d 757].

Therefore, there is a serious question as to whether Congress can lawfully permit individuals to practice medicine upon citizens of the State of California, when they do not meet the qualifications to practice medicine in that state. A decision on this constitutional question may readily be avoided by determining that congress did not intend to have petitioner's "student trainees" perform medical functions upon citizens of the State of California in petitioner's hospital.

Furthermore, the same result follows from the application of a corollary of this rule—*i.e.* that the Federal Act be construed in such a manner as to enable it to be applied harmoniously with the applicable state licensing laws. See *Head v. New Mexico Board,* 374 U.S. 424, 431-32 (1963); *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1963). This would serve to avoid striking down the state legislation by preventing a direct conflict between it and the federal statutes involved herein.

Moreover, the conclusion that neither Congress nor the Secretary of State intended to permit petitioner's "student trainees" to perform medical functions upon citizens of the State of California is supported by reason and logic. Both the Federal Act and Regulations were devoid of any reference to a method of testing the moral, experience or educational requirements of the foreign participants in this program. To the contrary, the selection of the participants was left almost exclusively to the respective sponsor. (22 C.F.R. § 63.4.) Also, the act and regulations did not contain any specific standards to govern the scope of the functions to be performed by the foreign participants. It seems highly improbable that Congress, in establishing this program,

desired that there be no means of reviewing the qualifications of any foreign participant who would be given the authority to perform medical functions upon citizens of any State. See *Head v. New Mexico Board,* 374 U.S. 424, 431-32 (1963). To the contrary, it seems clear that Congress wanted such vital functions to be performed only by those whose educational experience and moral qualifications had been carefully scrutinized by an appropriate reviewing agency. Congress may indicate, by its silence, that it intends to permit state regulations to be imposed on a federal program. *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103-04 (1963). In the present situation, unlike the case of *Sperry v. Florida,* 373 U.S. 379 (1963), upon which petitioner places great emphasis, Congress did not establish any federal agency to insure the state's obligation to protect its citizens from unskilled and unethical practitioners by testing prospective foreign participants and by insisting that such participants maintain high standards of integrity. See *Sperry v. Florida, supra,* at 402. It is readily apparent that Congress did not wish any participant to perform medical functions unless the particular state wherein such functions were to be performed had determined that he was qualified to do so. See *Retail Clerks v. Schermerhorn, supra,* at 103-04.

Likewise, the program, as it related to petitioner, did not authorize the performance of medical functions by Ohnishi or Sanchez. These individuals were described by the State Department as trainees who were to receive training in traumatic and reconstructive surgery, with special emphasis on reconstruction of the hand and forearm. [Exs. B-16, B-19.] The applicable Regulations defined a trainee as one who was to participate in the

program for the purpose of obtaining practical training in a specialized field of knowledge and skill in a nonacademic institution or agency. [Ex. B-10.] See 22 C.F.R. § 63.1(g)(2). The training given to students participating in the program was intended to have comprised many acts which fell short of the actual performance of medical functions. Examples of those acts would include: (1) observation; (2) attendance at hospital rounds; (3) discussion with the staff concerning what had been observed; (4) attendance at staff conferences; and (5) reading and reviewing current medical publications suggested by the staff and a discussion with the staff concerning the contents thereof. In this connection, we would like to note that one of the main purposes of the program, when it was created in the late 1940's, was to disseminate information of the American way of life. See 1948 U.S.C. Cong. Services, p. 1011. A strong understanding of the American way of practicing medicine can best be obtained by the processes of observation and discussions. In addition, the information disseminated should be complete and should include the important concept that our society will not permit any member of the public to hold himself out as being qualified to practice medicine. A complete picture of the manner in which medicine is practiced in this country necessitates an understanding that before one may engage in the privilege of practicing medicine, his qualifications must be examined by a responsible reviewing agency.

That Congress intended for the training of Ohnishi and Sanchez not to comprise the actual performance of medical functions is further illustrated by the manner

in which the Department of State described the program:

> "A program to provide (1) training in general and traumatic surgery at the California Emergency Hospital for qualified foreign medical *students* and (2) a three-year course in clinical laboratory for qualified foreign *students,* to make it possible for such *students* to obtain training in the United States in their respective fields, in the general interests of international exchange in the arts and sciences." [Emphasis added; Ex. B-7.]

Thus, it is apparent that the training contemplated under the program was to be of such a kind that is afforded to medical *students,* as opposed to interns and residents. A communication from the Department of State in Washington, which petitioner received on April 24, 1959, further emphasized this distinction. [Ex. B-8.] This letter concerned the matter of limiting the duration of the visits of the various types of participants under the federal program.[7] This document indicated that the administration of the entire exchange-visitor program differentiated between, on the one hand, those who were Doctors of Medicine participating as interns and residents, and, on the other hand those like Ohnishi and Sanchez, who were students engaging in practical training. Moreover, the Chief of Facilitative Services Staff, Bureau of Educational and Cultural Affairs, Office of the United States Programs and Services, Department of State, Washington, D. C., has indicated that petitioner, as a sponsor under the program, was required to be aware of and comply with

[7]These limitations are currently contained in 22 C.F.R. § 63.5(b).

all applicable federal, state and local laws. [Clk. Tr. p. 169.]

From the foregoing, it is readily apparent that the program, in actual operation, did not even remotely interfere with the licensing laws of the State of California. In no way did it permit the performance of medical functions upon citizens of the State of California by those participants whose experience, educational and moral qualifications had not been examined by a responsible governmental agency. Therefore, it is clear that both the language of the statute creating the program and its practical operation compel the conclusion that Congress intended that the program be applied harmoniously with the licensing laws of the respective states.

II.

The Holding of the California Supreme Court in No Way Conflicts With Any Decision of This Court.

Petitioner asserts that the decision of the California Supreme Court comes into direct conflict with two recent decisions of this Court, *Sperry v. Florida,* 373 U.S. 379 (1963), and *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187 (1956). However those cases are readily distinguishable from the present case.

In each of those cases, unlike the present case, there was a clearly expressed intent on the part of Congress to permit the unlicensed individuals in question to perform the acts for which the state required a license. Furthermore, in *Sperry,* the only citizens of the state who would require any protection were those individuals who would seek Sperry's help on an *exclusively federal*

problem—i.e., patent law. The decision in that case in no way implies that Sperry could hold himself out as an attorney or give advice regarding any other area of the law. Moreover, as we noted earlier, a critical distinction arises from the fact that Sperry's educational, moral and experience qualifications had already been examined by an appropriate reviewing agency before he was permitted to practice patent law in Florida. In *Miller,* the only party needing protection was the party contracting with Miller, namely, the *Federal Government.* Again, the appropriate Federal Regulations contained certain minimum qualifications which Miller was required to possess.

However, in the present case, the acts performed by Ohnishi and Sanchez do not relate to an exclusively federal activity. The citizens of the State of California affected by their activities would not have sought their aid on an exclusively federal problem. Finally, as we discussed earlier, the Federal Government did not establish or utilize any procedure to examine the qualifications of Ohnishi and Sanchez. Their selection as participants was left completely to petitioner.

On the other hand, the present case is directly on point with the case of *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1963). In that case, the State Statute prohibited the sale of avocados containing less than 8% of oil, whereas the Federal Regulations applied a different standard and purported to permit the sale of certain avocados containing less than 8% of oil. This Court upheld the State Act by construing the Federal Legislation in such a manner as to avoid a conflict, without impairing the federal superintendence in the field of interestate commerce. In that case, the source

of federal legislation was the power of Congress to regulate interstate commerce. The breadth of that power is comparable to that of the foreign relations power of Congress involved herein. In *Paul,* the subject matter involved was the maturity of avocados, which, according to this Court, was an inherently unlikely candidate for exclusive federal regulations. In the present case, the subject matter involved, the practice of medicine, is an equally unlikely candidate. *Barsky v. Board of Regents,* 347 U.S. 442, 449 (1954); *Linder v. United States,* 268 U.S. 5, 18 (1925). Hence, the result of the present case should be identical to *Paul.*

III.

There Is No Important Question of Federal Law.

In his Petition, petitioner has failed to indicate that the federal question involved in the present case is an important one. This failure has resulted from more than a mere oversight on the part of petitioner. Rather, any contention that the issues presented herein relate to *important* or *substantial* federal questions would, of necessity, be totally devoid of any support.

The opinion of the California Supreme Court (66 A.C. 391 at 398-399) indicates that respondent is precluded from assessing any penalty greater than probation as a result of those activities and violations relating to this petition. Hence, under no circumstances will the denial of the petition prevent petitioner from practicing medicine under his license. This is a factor which should be considered by this Court in determining

whether the petition presents an *important* federal question.

Moreover, the lack of significance presented by the petition is clearly illustrated by the fact that none of the rights or privileges of any other citizen will be affected by this case. We have examined every reported case which has had any connection with the United States Information and Educational Exchange Act from the time of its enactment in 1948.[8] Each of those cases concerns some sort of an immigration problem totally unrelated to the actual performance of any activities by any foreign participant under the program. None of these cases in any way interprets the nature and extent of the activities which the Federal Government contemplated would be engaged in by those participants.

We are totally unaware of the existence of any problems even remotely similar to the ones involved herein. The present case involves a unique factual situation as well as an uncommon interrelationship between the applicable federal and state enactments related thereto. The denial of the Petition by this Court would not deprive petitioner or anyone else of any basic and fundamental constitutional rights or liberties.

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[8] *Mendez v. Major*, 340 F. 2d 128 (8th Cir. 1965); *Samala v. Immigration and Naturalization Service*, 336 F. 2d 7 (5th Cir. 1964); *Talavera v. Pederson*, 334 F. 2d 52 (6th Cir. 1964); *Morales v. Immigration and Naturalization Service*, 311 F. 2d 715 (7th Cir. 1962); *Chae-Sik Lee v. Kennedy*, 294 F. 2d 231 (D.C. Cir. 1961); *Demirci v. Landon*, 225 F. 2d 1 (9th Cir. 1955); See also *United States v. O'Connor*, 135 F. Supp. 590 (U.S.D.C. 1955) where the Court emphasized that the purpose of the Act was to dissiminate information abroad.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondent.

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IN THE

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October Term 1967
No. 378

P. S. O'REILLY, M.D.,

Petitioner and Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

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P. S. O'REILLY, M.D.,

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BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

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Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Petitioner wishes to present the following points in reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari:

I.

The Present Case Involves an Important and Substantial Federal Question.

Contrary to Respondent's assertion, Petitioner contends that the present case involves an extremely important and substantial Federal question. Unless the decision of the California Supreme Court construing the United States Information and Educational Exchange Act of 1948 is set aside, that decision will stand

as authority for the proposition that all *future* Federal Exchange Programs under successor statutes will be subject to the vicissitudes and uncertainties of state licensing laws and state licensing agencies in the 50 states and may be wholly defeated by state laws and regulations.

The California Supreme Court's decision declares that exchange visitors duly approved by the Secretary of State under the Federal statute can be rejected by the California Board of Medical Examiners for various reasons. This veto power over the admission of foreign exchange visitors will reside equally with any other licensing agency in any of the 50 states under the California decision. Henceforth, state licensing boards will have a veto power whenever the particular Exchange Program involves any activity which, in the absence of Federal legislation, falls within the ambit of any state agency's powers. The exercise of such powers by state agencies could seriously impair and frustrate the exercise of leadership and policy guidance by the Secretary of State, it could wholly defeat specific exchange programs, and it could embarrass the government of the United States in its relations with other nations. It is submitted that the Federal question thus presented is of sufficient substance and importance to merit this Court's consideration and decision.

II.

Respondent's Brief Is Predicated Upon the Erroneous Assumptions That (1) Congress Did Not Consider the Office of the Secretary of State to Be a Responsible and Qualified Reviewing Agency and (2) That Congress Wished to Subject the Secretary of State's Determinations to Possible Review and Veto by Various State Licensing Agencies in the 50 States.

Throughout its brief, Respondent asserts that Congress could not have intended to permit foreign visitors to perform medical functions (or any other functions) without "any responsible and qualified reviewing agency" first determining the applicant's fitness. (In example, see Resp. Br. pp. 2 and 8-9). Inasmuch as the statute expressly confers such powers upon the Secretary of State, Respondent is in effect saying that the Office of the Secretary of State of the United States Department of State is not a responsible and qualified reviewing agency.

Surely, no such lack of Congressional confidence can be found in the statute or in its legislative history. To the contrary, it is unequivocally clear that Congress in fact intended to and did confer broad powers upon the Secretary of State, subject only to further Congressional scrutiny, *not* the random and uncoordinated review and veto by licensing agencies in the various states.

Moreover, as a corollary contention, Respondent seems to argue at page 9 that, if Petitioner's interpretation of the statute is correct, unqualified persons (as deter-

mined by the state licensing agencies) will be permitted to engage in licenseable activities within a state, and no avenue will be open to review their qualifications. This assertion is incorrect. Under 22 C.F.R. Section 63.3(b) the Secretary of State may revoke and cancel any Exchange Visitor Program for sufficient cause, such causes including "failure to maintain educational standards as established by competent professional agencies; . . ." Thus, if a state licensing agency became aware of any marginal or substandard practice, it could petition the Secretary of State to revoke and cancel the Exchange Visitor Program involved and the Secretary, in his discretion, could do so. Of course, such, a course of conduct by a state agency would constitute recognition of the applicability of the doctrine of Federal Supremacy. This the California Board of Medical Examiners will not do, and this is the nub of the present controversy.

III.

Drs. Ohnishi and Sanchez Could Not Fulfill Their Exchange Visitor Programs Without Performing Medical Acts as Defined by California Law.

Respondent again suggests, as it did in the State Courts, that Drs. Ohnishi and Sanchez could have fulfilled all of their requirements under the Exchange Visitor Program without performing any medical functions as defined by California law. This assertion finds no support in the record, it is contrary to every reasonable implication which may be drawn from the facts,

and it was rejected by the California Supreme Court, which expressly recognized that the fulfillment of the Exchange Programs under which Drs. Ohnishi and Sanchez were admitted would require them to perform medical acts as defined by California law. In this regard, it is noted that Drs. Ohnishi and Sanchez were admitted for the purpose of receiving practical training "in traumatic and reconstructive surgery, with special emphasis on reconstruction of the hand and forearm."[1] Both Drs. Ohnishi and Sanchez were licensed medical doctors in their native countries, and Dr. Ohnishi was a professor of surgery at a Japanese university. Dr. Ohnishi was admitted to the United Statee for a period of 18 months and Dr. Sanchez for five years. It is absurd to suggest that they could fulfill their training expectations for such prolonged periods of time merely by observation, discussion and reading without performing any medical acts as defined by California law. Even *undergraduate* medical students perform medical functions in California (see California Business and Professions Code, Section 2147).

Conclusion.

Respondent's position, concurred in by the California Supreme Court, is that an instrument of United States foreign policy, the Exchange Visitor Programs under which Drs. Ohnishi and Sanchez came to the United States, may not be implemented in California without

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[1]In the Petition for Writ of Certiorari at page 8, the word "reconsideration" should be changed to "reconstruction."

first obtaining the discretionary approval of the California Board of Medical Examiners. It is respectfully submitted that this application of State Supremacy is contrary to the intention of Congress with reference to this statute, and that the proper determination of this question presents a substantial Federal question which vitally affects an area of United States foreign policy and which the Congress has declared to be of the utmost importance.

Respectfully submitted,

KIRTLAND & PACKARD,
RICHARD L. KIRTLAND and
ELLIS J. HORVITZ,
Attorneys for Petitioner and Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 378

P. S. O'REILLY, M.D., PETITIONER

v.

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of the Court, dated December 4, 1967, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons stated below we do not believe that it raises any substantial federal question warranting review by this Court.

1. Petitioner is a physician who operates the California Emergency Hospital in Glendale, California. Pursuant to the United States Information and Edu-

cational Exchange Act of 1948,[1] the United States Department of State designated certain hospital programs in traumatic surgery and clinical laboratory training as "Exchange-Visitor Programs", with petitioner as their "Responsible Officer". The effect of that designation was to authorize petitioner to select qualified foreign medical students with a view to offering them training in specified aspects of medicine, and to permit those persons chosen by petitioner to enter the United States as non-immigrants using a special category of visa reserved for exchange visitors. The selection of individual students was petitioner's sole responsibility; his certification of an applicant's acceptance, transmitted to the appropriate American consular official abroad, was sufficient to obtain issuance of the exchange visitor's visa for that student. The Department of State performed no function in connection with individual applications beyond the formal determination that the applicant had been certified for this special visa.

As part of his training program, petitioner accepted Dr. Daniel Sanchez, a Mexican national, and Dr. Morimitsu Ohnishi, a Japanese national, neither of whom was licensed by the California authorities to practice medicine in that State. On August 21, 1959, both of these unlicensed doctors assisted petitioner in performing surgery. The Board of Osteopathic Examiners of the State of California found against petitioner on a charge of employing, aiding, and abetting Drs. Sanchez and Ohnishi in the unlicensed practice

[1] The revised Act is codified as 22 U.S.C. 1431-1480.

of medicine; execution of revocation of his license to practice medicine was stayed on condition of five years' probation, but he was ordered suspended from practice for 90 days.[2] That decision was ratified and adopted by the respondent Board of Medical Examiners of the State of California.[3]

Petitioner then instituted this suit in a California state court seeking to set aside the order of the Board of Medical Examiners. Both the Superior Court of Los Angeles County and the District Court of Appeal upheld the Board's decision. On further review, the California Supreme Court joined the lower courts in rejecting petitioner's defense based upon an alleged conflict between the medical licensing laws of California and the United States Information and Educational Exchange Act of 1948. The court concluded, however, that, because of the uncertainty of the preemption question and petitioner's apparent good faith, his punishment for the violation in question should be no greater than probation and it accordingly remanded the case to the Board to reconsider the penalty. (Pet. App. 6-8, 10.)

2. Petitioner argues from the premise, accepted by the court below (Pet. App. 6), that the state's licensing restrictions would to some extent frustrate the

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[2] Petitioner was also found to have engaged in a second act of unprofessional conduct not involved here, and both charges apparently were considered in determining the penalty.

[3] During the course of the proceedings, petitioner elected to become a licentiate of this Board and thus subject to its discipline.

implemenation of the federal program, to the conclusion that therefore the state law must yield by reason of the Supremacy Clause of the United States Constitution (Article VI, Clause 2). The government, however, does not share the view that such a clash of incompatible programs exists. In this connection, we respectfully direct the Court's attention to the October 5, 1962, letter sent the petitioner by the Department of State [4] in response to his inquiry detailing the position of the California authorities. In that letter, petitioner was expressly advised that, in the State Department's view, once the question of entry status is settled the participants in the Exchange-Visitor Program are subject to all state and local laws that would ordinarily be applicable, including the laws governing the practice of medicine and the training of medical personnel. Therefore, petitioner was informed, foreign nationals participating in his program must comply with all pertinent state laws and regulations.

The State Department continues to adhere to the position outlined in that letter; we submit this position is reasonable and wholly consistent with the terms and objectives of the authorizing statute, which does not contemplate supervision by the Department of State over the qualifications of individual participants.

Contrary to the implication in the petition (Pet. 2), the Department's role *vis-a-vis* these participants

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[4] For the convenience of the Court, the full text of the letter is reprinted, *infra*, pp. 6-7.

is merely to determine whether they are eligible for Exchange-Visitor visas; this determination does not involve any judgment of the professional competence or education of the applicant. See 22 C.F.R. § 63.4. Thus, in cases such as this, the United States does not purport to exercise the function—normally performed by local licensing authorities—of passing upon the professional qualifications of the applicants selected by various private "responsible officers" like petitioner.

In these circumstances, the application of California's medical licensing laws to petitioner does not conflict with either the terms or the administration of the federal statute.

CONCLUSION

For the foregoing reasons we do not urge review.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JANUARY 1968.

APPENDIX

In reply refer to
OCE/SP—25

October 5, 1962

Dear Mr. O'Reilly:

This office has received your letter of September 28, in which you refer to a hearing scheduled to take place in the near future when your hospital's Exchange-Visitor Program No. P-II-25 will be reviewed by the State Board of Osteopathic Examiners and the State Board of Medical Examiners of California. In your letter you requested the Department's advice with respect to the status of your program under federal and state laws.

Exchange-Visitor Program No. P-II-25 was designated on June 19, 1957, by the Secretary of State under the provisions of the United States Information and Educational Exchange Act of 1948, as amended, which has now been superseded by the Mutual Educational and Cultural Exchange Act of 1961. The effect of that designation was to authorize your hospital to select qualified foreign medical students with a view to offering them training in certain specified fields of medicine, and to permit them to enter the United States as nonimmigrants using a special category of visa reserved for exchange visitors. Neither the statute nor the designation of your program by the Secretary of State contemplated that aliens participating in your Exchange-Visitor Program would be able to do so without regard to the licensing and other laws governing the practice of medicine, and the training of medical personnel, in the State of California. It is accordingly the Department's opinion that anyone participating in your program must

abide by the pertinent laws and regulations of your State.

Your letter refers to the claim of the Boards that "the admittance of these people under the Exchange-Visitor Program No. P-II-25 is illegal". The Department would like to point out that admittance to the United States of aliens, including exchange visitors, is a matter under the jurisdiction of federal laws. Once admitted to the United States, however, the activities of an exchange visitor must comply not only with the federal law but with all applicable state and local laws and regulations.

If you have further questions regarding this matter, I would be pleased to hear from you.

Sincerely yours,

/s/ M. P. H.
MALCOLM P. HALLAM
Chief, Facilitative Services Branch
Office of Cultural Exchange

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